Supreme Court, U.S.
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No. 06-423

In the United States Supreme Court

DAVID J. CAUCCI, M.D.,
Petitioner,

v.

LAWRENCE F. MEKIC AND LOUISE MEKIC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the federal question presented by Petitioners, falsely characterizing the ruling below as a supposed criminal "contempt order," tortures the true record and is thus completely inapposite to the present civil tort suit involving a simple remedial award of fees and costs of $13,286.50 by virtue of a state trial court's consent decree which Petitioner never even moved to rescind or modify as required by clear state law.

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STATEMENT OF THE CASE

This case involves a consent order dated August 5, 2005 issued by the Court of Common Pleas of Lackawanna County, Pennsylvania, in the amount of $13,286.50 for out-of-pocket litigation costs unnecessarily incurred in a disrupted trial that resulted in a mistrial on January 19, 2005. The Pennsylvania trial court's August 5, 2005 consent order (Appendix B) was issued in response to an offer of settlement conveyed directly to the Court on August 3, 2005 by Petitioner's personal counsel, and thereafter accepted by Respondent on August 4, 2005. It did not involve any finding of criminal contempt, or indirect criminal content, as Petitioner asserts herein. Rather, this order represented a civil, compensatory and remedial award by agreement. (See Appendix C, Mekic's Motion for Reconsideration of the Honorable Court's Order of August 5, 2005 20(a)). The purpose of the agreed upon award was to compensate the respondent's Mekic for harm done, clearly a civil remedy.

Previously, in the February 4, 2005 Memorandum and Order of the Pennsylvania trial court recounting the events of the January, 2006 trial, the Court of Common Pleas of Lackawanna County did not sanction the Petitioner with any fine payable to the Court and did not find Petitioner in criminal contempt as erroneously asserted. It simply made a civil and remedial determination in a medical malpractice tort action in accordance with 42 Pa. C.S.A. §2503(7) to compensate the Respondent for harm suffered, a civil compensatory remedy – not a criminal contempt finding.

Thereafter, Petitioner breached the agreement represented by the August 5, 2005 consent order, and filed an appeal to the Pennsylvania Superior Court on September 6, 2005 without filing in the trial court any objection or petition to modify the consent order. That appeal was quashed by the Pennsylvania Superior Court on

December 8, 2005 in response to Respondent's Motion to Quash for failure Petitioner's to comply with Pa. R.A. Procedure 302, and applicable case law.

Pennsylvania has a rule designed to promote efficiency of the administration of justice, maximize accuracy of decisions and minimize errors, which requires that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pennsylvania Rules of Appellate Procedure Rule 302(a). It has risen to the level of hornbook law in Pennsylvania that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order. Pa. R.A.P. Rule 302(a); *Standard Pa. Practice 2d*, Vol. 16, Section 84.114. *Daly v. School District of Darby Township*, 434 Pa. 286, 252 Pa. 638, 640 (1969); *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977). This was the basis for Respondent's Motion to Quash the Petitioner's appeal to the Pennsylvania Superior Court.

Petitioner deliberately bypassed the requirement to present its reason for modification to the Pennsylvania trial court after the issuance of the August 5, 2005 consent order memorializing and directing compensatory costs to respondent. Rather, in the month following the August 5, 2005 order, Petitioner's personal counsel deliberately suggested to Respondent's counsel that he was trying to comply with the consent order, and was in the process of attempting to obtain payment from the insurance carrier. However, on the very last day of the appeal period, September 6, 2005, Petitioner took an appeal in open disregard of state consent order practices.

The Pennsylvania Superior Court on December 8, 2005, (Appendix D), quashed the appeal for failure to comply with Pa. R. A. P. Rule 302(a), and denied reconsideration on January 3, 2006 (order not attached to the Appendix by Petitioner). Thereafter, the Pennsylvania

Supreme Court by order of June 22, 2006 (see Appendix E), denied discretionary review. Each decision was well supported by the record, Pennsylvania Rules of Appellate Procedure Rule 302(a), and aforestated decisional law.

The Petition for a Writ of Certiorari should be denied based upon a record that shows the federal issues tendered by Petitioner are not truly presented, and based upon the venerable principle that an adequate and independent state ground would, in any event, bar direct review. Where a state court decision rests upon an adequate and independent state ground, the state ground controls the result of the case; irrespective of the merits of the federal issue. *Stembridge v. State of Georgia*, 343 US 541 (1956). Additionally, Petitioner has presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted, (See Sup. Ct. Rule 10), particularly where that the central premise of the Petitioner's argument never occurred, because the Petitioner was never convicted of criminal contempt.

Rather, the Pennsylvania trial court made a decision on February 4, 2005 that the Defendant's conduct was "vexatious" in accordance with Pa. R.C.P. §2503(7) a basis for awarding compensatory counsel fees and costs to a civil litigant. The Pennsylvania trial court made a determination that the respondents Mekics were entitled to reimbursement of out-of-pocket costs and counsel fees in a February 4, 2005 Memorandum. After settlement discussions, the entire matter had apparently been resolved by agreement for payment of costs alone on August 5, 2005, as the Court's consent order reflects.

Finally, the Petitioner has made deliberate and plain misstatements of fact such as page 7 suggesting that the trial judge "announced the contempt " decision in chambers and did not have any hearing. This is patently false and refuted by the record of January 19, 2005, which Petitioner failed to include in the Appendix. Respondent's counsel

filed a Motion requesting a mistrial with the Lackawanna County Prothonotary on the morning of January 19, 2005 prior to beginning of that trial day. Prior to the January 19, 2005 hearing on the issue, the trial judge met with counsel, and a hearing was subsequently held on the record. The trial judge **specifically directed defense counsel** on the record to consult with his client, and after such consultation thereafter experienced defense counsel responded that his client's wife did not publish the article for "the sole purpose of tainting a jury...", (N.T. pg. 1/19/05, p. 8. l. 16-17), undeniably admitting it was part of her purpose. (See trial courts Memorandum and Order p. 3, February 4, 2005 Supplemental Appendix D at 7a, 10a) Petitioner herein has failed to attach to its Appendix the trial court's memorandum and order of February 4, 2005, or the transcript of the 1/19/05 hearing at which time the mistrial was granted, both of which demonstrate that the Petitioner was not found in criminal contempt, or indirect criminal contempt. This is a violation of Sup. C. Rule 14(4), augering strongly against the Petitioner.

Respondents Mekic did not agree to withdraw their request for counsel fees at the May 16, 2005 hearing, as Petitioner plainly misstates (Petition, p. 5). Petitioner took a different position before the Pennsylvania Superior Court claiming that the trial Judge ruled at a hearing on May 16, 2005 that attorney's fees were not going to be awarded. Neither of Petitioners positions are true. (See Supplemental Appendix 24a-26a).

In this case, Petitioner has reformulated the issues presented and the record made in the state court. The Petition thus displays far more than a simple disregard of the adequate state grounds that independently sustain the remedial consent decree for costs entered below in a routine civil tort action. Indeed, by developing inapposite federal arguments not pressed or passed upon below, and by straining the bounds of the record itself, the Petition invites an impermissible sandbagging of the state court's civil trial

and appeals process. *Cf. Murray v. Carter*, 477 U.S. 478, 486-492 (1986).

REASONS THAT A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner has presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted, (See Sup. Ct. Rule 10), particularly given the fact that the central premise of the Petitioner's argument, i.e. a criminal contempt conviction, never occurred, thus invalidating the supposed federal premise of the Petition.

The Petition for a Writ of Certiorari should also be denied based upon the traditional principle that an adequate and independent state ground of decision bars direct review of any federal claim asserted in state court litigation. Where a state court decision rests upon an adequate and independent state ground, the state ground controls the result of the case; irrespective of the merits of the federal issue. *Stembridge v. State of Georgia*, 343 US 541 (1956),

The case below presented a straightforward and well settled application of Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue," which provides that issues not raised in the lower Court are waived and cannot be raised for the first time on appeal.

The federal contentions advanced by Petitioner have no applicability to the issuance of a consent order in this civil case reflecting settlement of the issue of costs and fees incurred by Respondents, plaintiffs below, due to the mistrial occasioned by Petitioner. Petitioner herein failed to attempt to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County, Pennsylvania. Since no issue was preserved for appeal, the Pennsylvania Superior Court properly quashed and dismissed Dr. Caucci 's appeal from

the August 5, 2005 consent Order because failure to comply with the requirement that a petition to modify, abrogate or rescind the consent order initially be presented to the trial court. The Pennsylvania Superior Court (*en banc*) properly denied reconsideration by per curiam order on January 3, 2006. The Pennsylvania Supreme Court justifiably denied discretionary review on June 22, 2006.

Any complaint regarding the lack of a fully developed record is a direct result of Petitioner's actions in failing to take appropriate steps below to create a record – one of the primary reasons for Pa.R.A.P. Rule 302(a). The independent and adequate state ground of decision is supported by the state interest, in the efficient administration of justice which Petitioners conduct herein has frustrated. Contemporaneous objection, or petition to modify, rescind or abrogate a consent order, and creation of an appropriate record, on both sides, affords the trial judge an opportunity to weigh the competing arguments and to maximize the opportunity for arriving at the correct decision and to minimize errors. If this rule is not enforced, trial counsel can sandbag the trial judge and not raise objections when the issue can be most expeditiously and efficiently resolved. The burden of preserving an issue and record for appeal is on the Petitioner. Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue" provides, in pertinent part:

> (a) General Rule. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Id.

It has risen to the level of hornbook law that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order.

Pa.R.A.P. Rule 302(a). *Standard Pa. Practice 2nd*, Volume 16, Section 85.114 provides, in pertinent part:

> Ordinarily, a party who consents to or acquiesces in a judgment or order cannot appeal from that judgment or order. (Citing *Pennsylvania Power & Light Co. v. Borough of Shenandoah*, 362 Pa. 43, 66 A.2d 290 (1949); *Brown v. Com. Dept. of Health*, 495 Pa. 456, 434 A.2d 1179 (1981).

Any move to modify or abrogate a consent order must be initiated before the trial court, as required by Pennsylvania Rules of Appellate Procedure Rule 302(a). See, *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977).

In *Sarsfield v. Sarsfield*, 251 Pa.Super, 516, 380 A.2d 899 (1977), the Pennsylvania Superior Court held that a party could not appeal from a consent decree dropping a former wife's claim for certain support arrearages, directing payment of others, and reaffirming a former husband's obligation to comply with a post-nuptial agreement where the party did not preserve any objections to the consent order before the lower court.

The Pennsylvania Supreme Court decision of *Daly v. The School District of Darby Township*, 434 Pa. 286, 252 A.2d 638, 640 (1969), involved a suit by a taxpayer and parent against elementary schools, seeking to enjoin implementation of a School Board resolution requiring the integration of elementary schools on a ratio of two black pupils to one white period. At an initial hearing before the Chancellor, settlement discussions were initiated before all of the parties. In an off-the-record meeting with the Chancellor, counsel for the School Board offered a proposed settlement, to which counsel for the appellant did not object and, therefore, acquiesced. As a result, the court issued an order denying as moot the appellant's petition for a

preliminary injunction and ordered compliance with the new plan that had been formulated by consent.

Subsequently, the appellant parent, on behalf of the minor, hired new counsel and then filed a notice of appeal, challenging the jurisdiction of the court.

With respect to the order of settlement issue, the Pennsylvania Supreme Court ruled that:

> Appellant's first contention is barred by appellant's participation in the October 4 settlement. Appellant's appeal apparently came as a great surprise to the chancellor, who in his opinion stated that "it was finally agreed (or I thought it was agreed) that the most workable plan would be as follows (the plan and its justification follow) * * *. Our plan did not work. The plaintiff changed lawyers and the new lawyer insists on having the case heard by the Supreme Court. Appellant, of course, cannot agree to a judicial settlement and then claim that because she has new counsel, she may take an appeal from that very agreement. Having made no objection to the chancellor's adjudication implementing the settlement, appellant is now bound by it, since having never objected below to the plan which was finally adopted, appellant cannot raise her objections for the first time on this appeal. See, e.g., *Bechler v. Oliva*, 400 Pa. 299, 161 A.2d 156 (1960); *Brenner v. Sukenik*, 410 Pa. 324, 189 A.2d 246 (1963).

Id. at 289, 252 A.2d at 640.

Petitioner, Dr. Caucci, attempted to appeal to the Pennsylvania Superior Court, Pennsylvania Supreme Court and now this Honorable Court, from the August 5, 2005

Order that he consented to. Petitioner did not file any pleading or motion with the trial Court seeking to have the August 5, 2005 Order rescinded, modified or abrogated, required by the Pennsylvania Rules of Appellate Procedure Rule 302(a) and well settled decisional precedent.

This action by Petitioner, Dr. Caucci, of taking an appeal, which was quashed, and now requesting discretionary allowance of appeal from an Order that he consented to, acquiesced in, and initiated, has further delayed the resolution of the claim below, to the great injury of Lawrence Mekic and Louise Mekic, the Respondents herein. This again has disrupted the orderly administration of justice.

CONCLUSION

Petitioner was not convicted of criminal contempt. He was directed to pay a civil, compensatory and remedial award of counsel fees to a litigant that was harmed by the "vexatious" conduct of him and his wife in accordance with 42 Pa. C.S.A. §2503(7). The matter was resolved by issuance of a consent order by the Court on August 5, 2005 in response to an offer of settlement by Petitioner's personal counsel.

Petitioners federal contentions regarding a supposed criminal conviction are inapposite to the consent orders and purpose, and are not germane to the record of proceedings below. The decisions of the state appellate courts are furthermore well supported by an adequate state ground which provides no basis, or reason, for this Honorable Court's review.

Accordingly, for all of the foregoing reasons, Respondents, Lawrence Mekic and Louise Mekic, hereby respectfully request this Honorable United States Supreme Court to deny the Petition for Certiorari.

Respectfully submitted,

FOLEY, McLANE, FOLEY, McDONALD & MacGREGOR, P.C.

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SUPPLEMENTAL APPENDIX

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA
(C.P. Lackawanna County No. 1661-2001)
No. 1512 MDA 2005
Filed: January 3, 2006

Lawrence F. Mekic and
Louise Mekic

v.

David J. Caucci, M.D.

ORDER

The application for reconsideration of this Court's order of December 8, 2005 is hereby **DENIED**.

Per Curiam

[STAMP]
TRUE COPY FROM RECORD
Attest: JAN 03 2006
/s/_____
Deputy Prothonotary
Superior Court of PA - Middle District

Appendix B

Pennsylvania Rules of Appellate Procedure Rule 302:

Rule 302. Requisites for Reviewable Issue

(a) **General rule**. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Appendix C

42 Pa. C.S.A. § 2503(7):

§2503. Right of participants to receive counsel fees

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

***

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of the matter.

Appendix D

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY
CIVIL ACTION – LAW
2001 CIV 1661

LAWRENCE F. MEKIC and
LOUISE MEKIC, his wife
Plaintiffs

v.

DAVID J. CAUCCI, M.D.,
Defendants

[DATE STAMP
LACKAWANNA COUNTY
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RECORDS]

MEMORANDUM AND ORDER

CORBETT, J.

AND NOW, this 4th day of February 2005, after consideration of the Plaintiffs' Motion for Default Judgment or in the alternative a Mistrial and payment of Plaintiffs' attorneys' fees, for the reasons set forth herein, it is the decision of this Court that a mistrial be declared and the Defendant be required to personally pay the Plaintiffs' costs and reasonable attorneys fees for trial preparation accrued for the period immediately prior to the scheduled trial up to and including January 19, 2005.

I. BRIEF FACTS:

This matter was originally scheduled for trial in November 2004. On September 30, 2004, it was Ordered that the jury trial be rescheduled for January 17-21, 2005. The trial actually began on January 18, 2005 due to the Martin Luther King holiday.

As a result of this trial being scheduled to begin on January 18, 2005 and other trial activity occurring in this Court the Lackawanna County Court Administrator selected jurors from a jury pool to appear in this Court on January 18, 2005. From that jury pool, counsel for the parties selected twelve jurors and two (2) alternates all from Lackawanna County. Opening statements were given and the plaintiff called witnesses.

In the January 18, 2005 evening edition of the *Scranton Times*, which serves the greater Lackawanna County area, on the editorial page in the "Letters to the Editor" section appeared a letter written by the Defendant's wife, Elizabeth Caucci, who identified herself as the Clarks Summit President of the Lackawanna County Medical Society Alliance. The letter titled, "*Malpractice Suits a Major Drawback*", read in pertinent part as follows:

> Editor: A recent survey from the Kaiser Family Foundation and the Harvard School of Public Health found 63 percent of adults in the U.S. cite lowering the costs of health care and health insurance as a top priority for the president and Congress. In addition, health care overall tied with terrorism/national security as the third most important issue.

> In a recent article, Scranton attorney David Fallk was incorrect in his assessment of the survey results. The report finds that the public considers malpractice lawsuits a significant factor in the rising costs of health care. Almost one-third of the people say that the most important factor in causing rising malpractice insurance rates is too many lawyers filing unwarranted lawsuits, while only 15 percent believe it is the high profits of insurers. Sixty-three percent favor caps on so-called pain and suffering awards. In truth, the title of the press release reads "Americans Favor Malpractice Reform."
>
> The loss of obstetrics at Mercy Wilkes Barre is an indication of the impact the medical liability crisis is having on our health care locally. There is no indication that the loss of medical services to our local patient population will not persist.
>
> Despite minor reforms, medical liability premiums rose again for 2005. The real cost is that patients are losing access to care because doctors are losing the ability to practice medicine.

Plaintiffs argue that the content of this letter implies that the lawsuit against her husband is "unwarranted." (See Trans., pg. 4). Plaintiffs also argue that the suggestion in the letter of caps on awards for pain and suffering tainted the jury. It tainted the jury because it will now have them considering placing a cap on any pain and suffering award it was considering, in contravention of Pennsylvania law.

Plaintiffs suggest that this letter was a purposeful attempt to get the jurors to do what interest groups have been unable to do, place caps on any award. In fact, Plaintiffs suggest that the letter was an attempt to tell this jury pool that if they did not decide in favor of the Defendant, they would be going against the President and Congress among others.[1] Plaintiffs claim that they have spent over $10,000.00 getting ready for this trial.

Defendant informed the Court that the article was submitted to the Scranton Times for publication in the week prior to the scheduled trial date. Defendant maintained that his wife "did not submit the article for the sole purpose of tainting a jury." (See Trans., pg. 8). Defendant maintains, however, that his wife did not know whether the article would be printed and, if it was, when it would be printed. Defendant's wife admitted she is a frequent contributor to The Times and acknowledged there is generally a few day turn around for publication.

Defendant, while not denying that the jury pool was tainted, suggested that a mistrial may be premature. He Defendant requested that the selected jury be polled. He argued that this would enable the Court to learn if the selected jury actually saw the article and if it was actually tainted. If the jury did not see the article, Defendant suggested continuing with the trial after appropriate cautionary instructions.

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[1]Plaintiffs also claim the letter implicitly states that if the jury issues an award against the doctor it will be doing so at its own peril since malpractice lawsuits cause doctors to stop practicing medicine. (See Trans., pg. 6).

II. DISCUSSION:

Under Pennsylvania law, "[o]nce the existence of a potentially prejudicial extraneous influence has been established by competent testimony, the trial judge must assess the prejudicial effect of such influence." *Carter v. U.S. Steel Corp.*, 529 Pa. 409, 604 A.2d 1010 (1992). The test to determine if prejudice exists is an objective one since the "trial judge is precluded from considering evidence concerning the subjective impact of an extraneous influence on any jury." *Id.* at 1016. In making its decision, the trial judge must decide ~~how an~~ "objective, typical juror would be affected by such an influence." *Id.*

In determining the reasonable likelihood that prejudice exists "'the trial judge should consider: (1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; (2) whether the extraneous influence provided the jury with information they did not have before them at trial; and (3) whether the extraneous influence was emotional or inflammatory in nature." *Id.* at 1016.

In this case, the parties were well aware of the scheduled trial date since it was set some three and a half months prior by Order of this Court. Both parties received copies of the filed Order and were present and prepared on the scheduled date.

Despite this knowledge, Defendant's wife chose to submit and have a letter published in the sole daily newspaper which serves this county at the time of trial. The issues raised in the letter are issues which relate directly to issues which will be decided at trial. These issues include, but are not limited to, the damages which could be awarded, whether certain caps should be imposed on any damages and the potential after effect of

the jury's decision if it decided for the Plaintiffs. The subject of the article contained information prohibited for consideration by the jury.

The letter was also inflammatory. As Plaintiffs indicated, the letter suggested that if damages are awarded in malpractice cases such as this, doctors, such as the Defendant, will be forced to close their practice. For these reasons, it is very clear that this publication was reasonably likely to cause prejudice.[2]

The fact that the Defendant's wife was present all day on January 18, 2005 provides support for this finding. She was present during the selection of the jury. She was introduced to the jury and sat behind the Defendant during the proceedings. The jury was certainly aware of her presence and who she was.

Under Pennsylvania law, a "participant may be awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. 2503(7). It is the finding of this Court that the conduct of the Defendant during the pendency of the trial was vexatious. Defendant did not deny that the published letter was meant to taint the jury. The tainted jury would undoubtedly prejudice the jury against any claim Plaintiffs would make during the trial or any award the jury might decide to give.

"Vexatious" is defined as "without reasonable or probable cause or excuse; harassing; annoying." Black's Law Dictionary. (7th Ed.). There is no doubt that the content of the letter published in a newspaper whose

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[2]It was not necessary for the Court to poll the jury to make this objective determination.

general circulation is primarily in Lackawanna County on the evening of the first day of trial by the Defendant's wife was vexatious. This is especially true in light of the fact that the Defendant was aware that the letter could taint the jury and was fully aware that its content addressed issues which would be decided at trial.

Throughout the first day of trial, the Defendant was observed making sarcastic grins and other obtuse facial expressions and gestures at every opportunity. His behavior was observed by this Court and specifically addressed in Plaintiffs' Motion. To the Court the Defendant's behavior showed an obvious disdain for its authority and a total lack of respect to the Court and the entire process. At the time of observation the Court was of the opinion that Defendant did so at his own peril. In light of the letter, however, Defendant's actions appear to be more calculating and contemptuous. In hindsight, the Defendant's behavior appears to be in furtherance of the arguments and ideas raised in the letter.

The Court respects the Defendant and his wife's right to express their opinion or publish a letter pontificating on the subject of malpractice or any other matter they deem important. However, when the specific purpose of that expression or publication is designed to taint the jury and ultimately impact its ability to make unbiased decisions in Defendant's own trial, that action is going beyond the freedoms allowed. It must again be emphasized that the Defendant admitted the letter, at least in part, was designed to taint the jury. Defendant and his wife's right to freedom of speech during the course of the trial must be balanced against the Plaintiffs' right to a fair and impartial trial.

Since the aforementioned conduct was vexatious, this Court awards sanctions in the form of reasonable

attorney fees to Plaintiffs. The attorney fees are to be paid directly by the Defendant since it was the action of his wife that caused the mistrial and because it was admitted that the purpose of the letter was, at least in part, to taint the jury. The Court shall view the Plaintiffs' calculation of costs and attorney fees to determine what is reasonable before any are actually awarded.

BY THE COURT:

/s/ _____ J.
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Appendix E

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 47 M.T. 2006

LAWRENCE F. MEKIC and LOUISE MEKIC,

Respondents

v.

DAVID J. CAUCCI, M.D.,

Petitioner

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL

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Mekics' Motion for Reconsideration of the August 5, 2005 Order of the Court of Common Pleas, which Motion was Filed in the Court of Common Pleas of Lackawanna County on August 30, 2005

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10.	*Patterson v. People of the State of Colorado, ex. rel. Attorney General*, 205 U.S. 454, 562, 27 S.Ct. 556, 558, 51 L.ED. 879 (1907)	3
11.	*Pennsylvania Power & Light Co. v. Borough of Shenandoah*, 362 Pa. 43, 66 A.2d 290 (1949)	14

12.	*Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977)	14
13.	*Vito v. Vito*, 380 Pa. Super. 258, 259-62, 551 A.2d 573, 574 (1998)	5
14.	Pa.R.C.P. Rule 302(a)	1, 13, 14
15.	Pa.R.C.P. Rule 3517	11
16.	42 Pa.C.S.A. 2503(7)	3, 4, 7, 8

STATEMENT OR QUESTION PRESENTED FOR APPEAL:

Did the Superior Court properly quash the appeal of Petitioner herein, David J. Caucci, M.D., from the August 5, 2005 consent Order issued by the Court of Common Pleas, where Dr. Caucci failed to petition the lower Court to modify, rescind or abrogate the August 5, 2005 consent Order in order to preserve any issues for Appeal in accordance with Pennsylvania Rules of Appellate Procedure ("Pa.R.A.P.") Rule 302(a)?

SUGGESTED ANSWER:

Yes.

Petitioner, Dr. Caucci, failed to preserve any issue for appeal by failing to file a petition to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County. Rather, on September 6, 2005, Petitioner, Dr. Caucci, filed a Notice of Appeal of the August 5, 2005 consent Order to the Pennsylvania Superior Court without preserving any issue for appeal from the consent Order, in accordance with Pa.R.A.P. 302(a). The Pennsylvania Superior Court properly quashed his appeal by *Per Curiam* Order on December 8, 2005. Further, the Pennsylvania Superior Court subsequently denied Dr. Caucci's application for reconsideration of the Pennsylvania Superior Court's Order of December 8, 2005, by *Per Curiam* Order dated January 3, 2006.

STATEMENT OF THE CASE:

This case involves a medical malpractice trial that began on January 18, 2005 in the Court of Common Pleas of Lackawanna County, before the Honorable Trish Corbett. A jury was selected; opening statements were given; and witnesses were called. A mistrial was declared on January 19, 2005, because of the vexatious conduct of the Defendant/Petitioner, David J. Caucci, M.D., and his wife, Elizabeth Caucci, who had identified herself as "President of the Lackawanna County Medical Society Alliance." Mrs. Caucci was present throughout the proceedings, including jury selection, opening statements, testimony and arguments in Court and provided a list of questions that defense counsel should be making inquiry about in preparation for the case.[1]

For reasons expressed in the trial Court's February 4, 2005 Memorandum and Order, Petitioner, Dr. Caucci, visibly and repeatedly expressed disdain for the lower Court in his conduct throughout the proceedings. Petitioner, Dr. Caucci, failed to attach the February 4, 2005 Memorandum of the Honorable Trish Corbett to his Petition for Allowance of Appeal.

On the evening of the first day of trial, after the jury was empaneled, Elizabeth Caucci, who identified herself as "President of the Lackawanna Medical Society Alliance," prominently published a Letter to the Editor in the only newspaper of general distribution in Lackawanna County, *The Scranton Times*, entitled "Malpractice Suits – A Major Drawback." Mrs. Caucci

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[1]See Footnote 1 of "Plaintiffs' Brief in Response to Defendant's Motion to Strike and Motion to Recuse filed by David Caucci, M.D." Plaintiff filed this Brief of record on April 14, 2005 in the Court of Common Pleas of Lackawanna County.

deliberately sent her letter to *The Scranton Times* no more than five (5) days before the trial, knowing that it would be published during the trial or on the eve of trial (which had been specially listed since September 2004). The text of the entire letter is contained in the Court's February 4, 2005 Memorandum and Order which is attached hereto as Exhibit A. The most egregious aspect of the letter is that Mrs. Caucci was clearly attempting to influence the empaneled jury by suggesting that a verdict for the Mekics in her husband's case would raise the jury's own personal health care premiums and would restrict their access to health care, thus suggesting that the jury had a personal stake in the outcome.[2]

The Court of Common Pleas of Lackawanna County made a specific finding that Dr. Caucci's conduct was "vexatious," in accordance with 42 Pa.C.S.A. §2503(7), which allows an award of counsel fees against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter. (See February 4, 2005 Memorandum and Order, which is attached hereto). The Trial Court **did not impose any fine payable to the Court** on Petitioner, Dr. Caucci (which might be considered an "indirect criminal contempt").

At the January 19, 2005 hearing, Petitioner, Dr. Caucci, was represented by counsel, Attorney John McGrath. Petitioner, Dr. Caucci's, counsel did not

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[2]Mr. Justice Oliver Wendell Holmes said in *Patterson v. People of the State of Colorado, ex. rel. Attorney General*, 205 U.S. 454, 562, 27 S.Ct. 556, 558, 51 L.ED. 879 (1907):

> **The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.**

request an evidentiary hearing but, in argument, stated that Mrs. Caucci ". . . did not print [the article] for the **sole** purpose of tainting the jury . . ." (See Transcript, January 19, 2005, p. 8, l. 16-17), thus undeniably admitting that it was a motive of her publication [Emphasis added]).

After a hearing on the record, in which Petitioner, Dr. Caucci's, counsel made a tactical decision and did not request to offer any testimony from the Cauccis or other witnesses, a mistrial was declared on January 19, 2005. The Honorable Trish Corbett, Judge of the Court of Common Pleas of Lackawanna County, entered an oral Order on the record that Respondents' Mekics attorneys' fees and costs would be awarded, but the Court directed counsel to submit a calculation of reasonable attorneys' fees and costs to the Court. Petitioner, Dr. Caucci, through counsel, did not timely object that he was being convicted of indirect criminal contempt without being afforded due process, or that Mrs. Caucci's First Amendment rights were being abridged. See, *Diamond v. Diamond,* 715 A.2d 1190, 1196, n.10 (Pa. Super. 1998)(failure to make a timely and specific objection and to request an evidentiary hearing constitutes a waiver of any procedural due process claim); See, generally, *Dilliplaine v. Lehigh Valley Trust Co.,* 457 Pa. 255, 322 A.2d 114 (1974). The Court issued a Memorandum and Order on February 4, 2005.

Contrary to the Petitioner's assertions herein, the Court of Common Pleas of Lackawanna County did not find Dr. Caucci in "criminal contempt" (or "indirect criminal contempt" as Dr. Caucci argued to the Pennsylvania Superior Court below) but, rather, made a finding of "vexatious conduct," in accordance with 42 Pa.C.S.A. §2503(7). The trial Court issued a civil, remedial, and compensatory award of costs to the

Respondents, Lawrence and Louise Mekic, to ameliorate the harm caused by Petitioner, Dr. Caucci, and his wife. The dominant purpose of the award was clearly to compensate the Respondents Mekic for harm done – clearly a civil remedy. The Court of Common Pleas of Lackawanna County did not sanction Petitioner, Dr. Caucci, with any **fine payable to the Court**, which might then be considered an "indirect criminal contempt," which Respondent had raised for the first time in his Motion to Strike, filed February 14, 2005, twenty-five (25) days after the mistrial.

The *Diamond* court, cited by Petitioner, demonstrates that (1) when the fine is both unconditional and **payable to the court**, that portion of the judge's order is criminal rather than "civil" and (2) where the order requires payment of costs or attorneys' fees to a party to remedy a harm by "vexatious" conduct, the court's order is civil. Petitioner confuses the application of the rule where a payment **to the court** is considered remedial when the defendant can avoid paying a fine **to the court** simply by complying with the court's order.

In *Diamond*, the Pennsylvania Superior Court stated:

> In this case, the [$500] fine imposed was both unconditional and **payable to the court**. Thus, the punishment was both "certain" and beyond appellant's power to escape. These facts clearly render that part of the judge's order criminal instead of civil. Citing *Vito v. Vito*, 380 Pa. Super. 258, 259-62, 551 A.2d 573, 574 (1998), cited with approval in *Hicks v. Feiock*, 45 U.S. 624, 631-632, 108 S.C. 1423, 99 L.ED.2D 721 (1988) (**"if the relief provided is a fine,**

> **it is remedial when it is paid to the complainant, and punitive when it is paid to the court, although a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.")**[3]

Diamond v. Diamond, 715 A.2d at 1194 (emphasis added).

Also, Petitioner fails to recognize that the *Diamond* decision dismissed as interlocutory the appeal from the portion of the court's order granting Mrs. Diamond $3,000 in counsel fees because it was not a criminal contempt order, but rather was civil. *Id.* 715 A.2d at 1199.

In *Commonwealth v. Ashton*, 824 A.2d 1198, 1200 (Pa. Super. 2003), the contempt order directed that "James F. Donohue shall pay forthwith a fine of $500.00 **to the Clerk of Court** . . ." *Id.* 824 A.2d at 1200 [emphasis added].

On or about February 10, 2005, Plaintiffs/ Respondents submitted a calculation of costs and

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[3]In Footnote 2, the *Diamond* decision stated that:

> By order dated March 18, 1997, the trial court entered a further order clarifying that the $500 fine was "payable to the Prothonotary as a consequence of [husband] having been found in contempt of the order of 8/9/96.

Id. 715 A.2d at 1192

attorneys' fees to the Honorable Trish Corbett and to defense counsel for Defendant/Petitioner Dr. Caucci. This included a calculation of $13,286.50 for out-of-pocket expenses incurred by the Plaintiffs/Appellees for the approximately two weeks leading up to the trial and mistrial. A separate calculation of attorneys' time was submitted to the Court for a period of nine (9) days, a conservative estimate for lead counsel alone, totaling 74.7 hours. In the February 10, 2005, letter, Appellee/ Plaintiffs' counsel stipulated that he would accept the identical hourly rate of defense counsel, which was asserted to be $150.00 per hour.

On or about February 14, 2005, Petitioner, Dr. Caucci, filed a Motion to Strike, attempting to raise issues that were not raised at the on the record hearing on January 19, 2005, or even prior to the issuance of the lower Court's Memorandum and Order of February 4, 2005. The Plaintiffs/Respondents Mekic, through counsel, opposed the untimely raising of the issues, such as "indirect criminal contempt, due process and retroactive gag order" on both procedural and substantive grounds, including defense counsel's tactical decision not to call witnesses at the January 19, 2005 hearing and failure to timely raise any First Amendment issues. While this case does not involve an "indirect criminal contempt," the very case, *Diamond v. Diamond*, 715 A.2d 1190, 1196, n. 10 (Pa. Super. 1998), cited by Petitioner, Dr. Caucci, demonstrates that failure of counsel to timely object to the nature of the proceeding constitutes a waiver of the right to challenge an indirect criminal contempt conviction for lack of procedural due process. See *Diamond v. Diamond*, 715 A.2d 1190, 1196 n. 10 (Pa. Super. 1998).

The Motion to Strike was briefed and argued on or about May 16, 2005. The Trial Court Judge, the

Honorable Trish Corbett, attempted to begin to mediate the counsel fees and costs issue at that time.

Respondents Mekic did not agree to withdraw their request for counsel fees at the May 16, 2005 hearing, as Petitioner plainly misstates (Petition, p. 5). In fact, on May 19, 2005, undersigned counsel wrote a supplemental letter brief in support of the Mekics' request for counsel fees and costs, pointing out that Petitioner's counsel had created Supreme Court authority out of whole cloth at the argument before Judge Corbett of May 16, 2005.

> I am writing this letter as a follow up to the argument of counsel for Dr. Caucci, Mr. Griffith, regarding his citation to *Kulp v. Hrivnak*, which he asserted was a Supreme Court case that rebutted the Pennsylvania Superior Court cases that a counsel fee award under 42 Pa.C.S.A. § 2503(7) is not an "indirect criminal contempt," but rather, a remedial compensatory award payable to the Mekics. Dr. Caucci cited in his Brief, *Diamond v. Diamond*, 715 A.2d 1190, 1199 (Pa. Super. 1998) and *Commonwealth v. Ashton*, 824 A.2d 1198 (Pa. Super. 2003). Rather than support Dr. Caucci, both *Diamond* and *Ashton* recognize that where the counsel fee award is payable to the complaining party, the matter is not an indirect criminal contempt, but a civil remedial award. The cases cited by Dr. Caucci establish that **only where a fine is payable to the Court**, the Order is considered an indirect criminal contempt.

* * *

> The reason that I was not familiar with the Supreme Court case of *Kulp v. Hrivnak*, 765 A.2d 796 (Pa. Super. 2000), is because there is no Supreme Court decision by that title at that cite. *Kulp v. Hrivnak* was a Superior Court case which actually supports the position of the Plaintiff/s that your Order was entered appropriately in this case under 42 Pa.C.S.A. § 2503(7).

(Letter was attached as an Exhibit to Affidavit of Michael J. Foley, Esq., in support of the Motion to Quash before the Pennsylvania Superior Court).

On or about August 3, 2005, counsel for Petitioner, Dr. Caucci, advised the Honorable Trish Corbett in a telephone conversation that Petitioner, Dr. Caucci, would agree and acquiesce to an Order for payment of costs incurred by the Respondents prior to the mistrial in the above-referenced matter, if his insurance carrier would be permitted to pay the costs, but would not pay counsel fees voluntarily. Previously, Judge Corbett had insisted that Petitioner, Dr. Caucci, personally pay the costs and counsel fees to Respondents' counsel.

In response to Petitioner, Dr. Caucci's, offer, on or about August 4, 2005, the Honorable Trish Corbett contacted the undersigned counsel for the Plaintiffs/ Respondents and related the offer conveyed by Petitioner, Dr. Caucci's, counsel to her on August 3, 2005. In response to Petitioner, Dr. Caucci's offer, Plaintiffs/ Respondents' counsel agreed to waive attorneys' fees (74.7 hours for approximately nine (9) days leading up to and including trial) with the express agreement and understanding that the litigation costs of $13,286.50

previously submitted on or about February 10, 2005, would be paid shortly thereafter by Petitioner, Dr. Caucci's, insurance carrier. After this agreement was reached, Respondents' counsel had expected that the case would then be moved back onto the trial docket.

In response to that offer and acceptance, based on the representations of both counsel for Petitioner, Dr. Caucci, and undersigned counsel, the Honorable Trish Corbett issued a consent Order on August 5, 2005, directing that Petitioner, Dr. Caucci, pay Plaintiffs' costs of $13,286.50. In response to the August 3 and August 4, 2005 representations of counsel, the trial Court's August 5, 2005 Order specifically reflected that Plaintiffs would waive the payment of counsel fees, by agreement of counsel. This August 5, 2005 Order states:

> AND NOW, on this 5th day of August, 2005, IT IS HEREBY ORDERED, ADJUDGED and DECREED that in compliance with this Court's oral order contained in the record of January 19, 2005, Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties, Plaintiffs' attorneys' fees shall be waived.

Subsequently, Petitioner, Dr. Caucci failed to comply with the agreement.

In an attempt to fulfill the agreement, Mr. Griffith, counsel for Petitioner, Dr. Caucci, also wrote to undersigned counsel, Michael J. Foley, on August 23, 2005, in pertinent part, that **"if I do not receive his**

check, I will call you on Wednesday." (See Griffith correspondence to Michael J. Foley, dated August 23, 2005, submitted regarding the Motion to Quash and/or Dismiss in the Superior Court below).

In an abundance of caution, Plaintiffs/ Respondents thereafter filed a Motion for Reconsideration, on or about August 30, 2005, requesting the Court of Common Pleas of Lackawanna County to reconsider the August 5, 2005 Order pertaining to the waiver of counsel fees, if Petitioner, Dr. Caucci, breached the agreement. **The Motion for Reconsideration reflects what is asserted herein by Respondents Mekic and was to be reviewed by Judge Corbett, who obviously knew what had transpired. (See Exhibit B).** In Paragraph 2 of Mekic's Motion for Reconsideration of the August 5, 2005 Order, the Respondents herein recounted the events leading up to the issuance of the August 5, 2005 consent Order.

> 2. Prior to the issuance of the Court's Order, the undersigned counsel, Michael J. Foley, received a telephone call from the Honorable Trish Corbett, advising that counsel for Dr. Caucci, James L. Griffith, had contacted her and advised that the insurance carrier would pay the costs, but not the attorneys' fees, if that was an acceptable resolution of the issue. Based upon that understanding, Plaintiffs agreed to accept payment of the costs that were listed in Plaintiffs' February 10, 2005, letter, and withdrew their claim for counsel fees, conditioned on the fact that Dr. Caucci, through his insurance carrier, would pay the costs.

(See Exhibit B attached hereto).

However, the Court of Common Pleas could not act on the issue before the Petitioner, Dr. Caucci, filed a Notice of Appeal on September 6, 2005, without preserving any objections to the issuance of the consent Order.

Petitioner failed to take any steps to preserve any issues for appeal before the trial court, such as objecting to the consent Order, or seeking to have the Court of Common Pleas modify or rescind the consent settlement Order of August 5, 2005.

Petitioner, Dr. Caucci, filed his Docketing Statement in the Pennsylvania Superior Court on or about September 28, 2005. In Dr. Caucci's Docketing Statement filed with the Pennsylvania Superior Court on September 28, 2005, Dr. Caucci failed to state that Judge Corbett's Order of August 5, 2005 was issued in response to an offer of settlement made by Dr. Caucci's personal counsel on August 3, 2005. Petitioner, Dr. Caucci, never mentioned that fact, which was raised by the Respondents, Mekic, in their Motion to Quash and/or Dismiss and associated filings. This constituted an obvious violation of the Pennsylvania Rules of Appellate Procedure, Rule 3517.

Respondents, Lawrence Mekic and Louise Mekic, subsequently filed an appropriately verified Motion to Quash and/or Dismiss the appeal, on or about October 26, 2005. Petitioner, Dr. Caucci, filed a response, attaching an affidavit of his counsel and the August 23, 2005 letter, which implicitly supported the Mekics' position on the Motion to Quash ("If I do not receive his check, I will call you on Wednesday"). Respondents Mekic filed an Affidavit of Attorney David Fallk, Supplemental Affidavit

of Attorney Michael J. Foley, with attachments, and a Reply Brief of Respondents Mekic in support of the Motion to Quash. The Pennsylvania Superior Court granted the Motion to Quash on December 8, 2005. Petitioner, Dr. Caucci, subsequently filed an Application for Reargument to the Pennsylvania Superior Court on December 22, 2005.[4]

The Pennsylvania Superior Court denied the Application for Reargument on January 3, 2006. On or about February 2, 2006, Dr. Caucci filed the instant Application for Appeal to this Honorable Court.

Petitioner, Dr. Caucci's, Statement of the Case to this Honorable Court plainly misstates the record by asserting that Respondents' counsel agreed to withdraw their claim for attorneys' fees "after a discussion in Chambers months later" (referring to the May 16, 2005 argument, which was the only discussion in Chambers).

In fact, this offer and acceptance came in response to a telephone call from Mr. Griffith to the Honorable Trish Corbett on August 3, 2005, which offer was

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[4]In his Brief in Opposition to the Motion to Quash (p. 1-2), Dr. Caucci demonstrably misstated to the Pennsylvania Superior Court that Mrs. Caucci wrote her article "in rebuttal to an article published that week by a lawyer who represents Appellee" (referring to Attorney Michael J. Foley) (see Caucci Brief at p. 1-2). Now in this Petition for Allowance of Appeal to this Honorable Court, Petitioner, Dr. Caucci, now claims that Mrs. Caucci was responding to "an article submitted by a Scranton lawyer," Attorney David Fallk. In actuality, Attorney Fallk did not write any article, but had a one-sentence quote contained in an article in the Business Section of *The Scranton Times* which was written by *The Scranton Times* staff writer Jeff Sonderman. Attorney Fallk has no association with the Mekics or with Foley, McLane, Foley, McDonald & MacGregor, P.C. (See Fallk affidavit offered by Respondents in support of the Motion to Quash in the Pennsylvania Superior Court).

accepted on August 4, 2005. Petitioner, Dr. Caucci, took a different position in opposition to the Motion to Quash before the Superior Court, claiming that Judge Corbett ruled on May 16, 2005 that she would not award counsel fees. Both positions of Petitioner, Caucci, are contradicted by a letter written to Attorney Michael J. Foley by Attorney James L. Griffith on August 23, 2005, where Mr. Griffith acknowledges the substance of this August 3, 2005 conversation with Judge Corbett, in a letter to undersigned counsel, "I reported to the Judge that I had spoken to the representative of Dr. Caucci's insurance company. He rejected any request that his company pay counsel fees." Mr. Griffith, counsel for Petitioner, Dr. Caucci, further wrote to undersigned counsel, Michael J. Foley, on August 23, 2005, in pertinent part, that **"if I do not receive his check, I will call you on Wednesday."**

Reasons that Allowance of Appeal Should be Denied

This case presents a straightforward and well settled application of Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue," which provides that issues not raised in the lower Court are waived and cannot be raised for the first time on appeal.

Dr. Caucci failed to attempt to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County. Since no issue has been preserved for appeal, the Pennsylvania Superior Court properly quashed and dismissed Dr. Caucci's appeal from the August 5, 2005 consent Order.

Any complaint regarding the lack of a record is a direct result of Petitioner's actions in failing to take appropriate steps below to create a record – one of the primary reasons for Pa.R.A.P. Rule 302(a). The burden of preserving an issue and record for appeal is on the Petitioner. Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue" provides, in pertinent part:

> (a) General Rule. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Id.

It has risen to the level of hornbook law that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order. Pa.R.A.P. Rule 302(a).

Standard Pa. Practice 2nd, Volume 16, Section 85.114 provides, in pertinent part:

> Ordinarily, a party who consents to or acquiesces in a judgment or order cannot appeal from that judgment or order. (Citing *Pennsylvania Power & Light Co. v. Borough of Shenandoah,* 362 Pa. 43, 66 A.2d 290 (1949); *Brown v. Com. Dept. of Health,* 495 Pa. 456, 434 A.2d 1179 (1981).

Any move to modify or abrogate a consent order must be initiated before the trial court, as required by Pennsylvania Rules of Appellate Procedure Rule 302(a). See, *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d

899 (1977).

In *Sarsfield v. Sarsfield*, 251 Pa.Super, 516, 380 A.2d 899 (1977), the Pennsylvania Superior Court held that a party could not appeal from a consent decree dropping a former wife's claim for certain support arrearages, directing payment of others, and reaffirming a former husband's obligation to comply with a post-nuptial agreement where the party did not preserve any objections to the consent order before the lower court.

The Pennsylvania Supreme Court decision of *Daly v. The School District of Darby Township,* 434 Pa. 286, 252 A.2d 638, 640 (1969), involved a suit by a taxpayer and parent against elementary schools, seeking to enjoin implementation of a School Board resolution requiring the integration of elementary schools on a ratio of two black pupils to one white period. At an initial hearing before the Chancellor, settlement discussions were initiated before all of the parties. In an off-the-record meeting with the Chancellor, counsel for the School Board offered a proposed settlement, to which counsel for the appellant did not object and, therefore, acquiesced. As a result, the court issued an order denying as moot the appellant's petition for a preliminary injunction and ordered compliance with the new plan that had been formulated by consent.

Subsequently, the appellant parent, on behalf of the minor, hired new counsel and then filed a notice of appeal, challenging the jurisdiction of the court.

With respect to the order of settlement issue, the Pennsylvania Supreme Court ruled that:

> Appellant's first contention is barred by appellant's participation in the October 4

> settlement. Appellant's appeal apparently came as a great surprise to the chancellor, who in his opinion stated that "it was finally agreed (or I thought it was agreed) that the most workable plan would be as follows (the plan and its justification follow) * * *. Our plan did not work. The plaintiff changed lawyers and the new lawyer insists on having the case heard by the Supreme Court. Appellant, of course, cannot agree to a judicial settlement and then claim that because she has new counsel, she may take an appeal from that very agreement. Having made no objection to the chancellor's adjudication implementing the settlement, appellant is now bound by it, since having never objected below to the plan which was finally adopted, appellant cannot raise her objections for the first time on this appeal. See, e.g., *Bechler v. Oliva*, 400 Pa. 299, 161 A.2d 156 (1960); *Brenner v. Sukenik*, 410 Pa. 324, 189 A.2d 246 (1963).

Id. at 289, 252 A.2d at 640.

Petitioner, Dr. Caucci, attempted to appeal to the Pennsylvania Superior Court from the August 5, 2005 Order that he consented to. Petitioner, Dr. Caucci, did not file any pleading with the trial Court seeking to have the August 5, 2005 Order rescinded, modified or abrogated.

This action by Petitioner, Dr. Caucci, of taking an appeal, which was quashed, and now requesting discretionary allowance of appeal from an Order that he consented to, acquiesced in, and initiated, has further

delayed the resolution of the claim below, to the great injury of Lawrence Mekic and Louise Mekic, the Respondents herein. This again has disrupted the orderly administration of justice.

CONCLUSION

Accordingly, for all of the foregoing reasons, Respondents, Lawrence Mekic and Louise Mekic, hereby respectfully request this Honorable Supreme Court to deny the Petition for Allowance of Appeal.

Dated: February 15, 2006

Respectfully submitted,

FOLEY, McLANE, FOLEY,
McDONALD & MacGREGOR, P.C.

By: _____

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